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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TROY LE RAMON LUCAS et al., Defendants and Appellants.	E033986 (Super.Ct.No. FSB028773) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. Affirmed.

Doris S. Browning, under appointment by the Court of Appeal, for Defendant and Appellant Troy Le Ramon Lucas.

Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant Charles Anderson III.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia and Peter Quon, Jr., Supervising Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Troy Le Ramon Lucas and Charles Anderson III were jointly charged in an amended information with three counts: murder of Joe Roksa (count 1; Pen. Code, § 187, subd. (a));[1] attempted robbery of Roksa (count 2; §§ 211 & 664); and attempted second degree burglary (count 3; §§ 459 & 664). Certain enhancement allegations were also alleged.

The two defendants were tried in a joint trial before separate juries. Each jury found the respective defendant guilty on all three counts and found certain enhancement allegations true. On count 1 (murder), Lucas was sentenced to prison for an indeterminate term of 25 years to life. He was further sentenced to a consecutive indeterminate term of 25 years to life on the enhancement of discharge of a firearm causing great bodily injury or death. (§ 12022.53, subd. (d).) Anderson was sentenced to an indeterminate term of 25 years to life in prison on count 1 and a consecutive term of one year on the true finding that a principal was armed with a gun during the commission of the crime.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, Lucas contends that a prosecutor's comment during closing argument violated his Fifth Amendment rights under *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).[2] Anderson argues that the court erred (1) in failing to instruct the jury sua sponte as to the law concerning the testimony of accomplices, and (2) in failing to excuse his jury from hearing testimony from a witness called in Lucas's defense case. We hold that the court did not err in failing to excuse the Anderson jury during Lucas's defense case. We further hold that any *Griffin* error or error in failing to instruct on accomplice principles was harmless. Accordingly, we affirm the judgments.

SUMMARY OF FACTS

The prosecution presented the following evidence to both juries. Paul Reyes lived with the victim, Roksa. On the morning of November 28, 2000, Reyes heard what sounded like a staple gun outside his house. He then saw Roksa lying on the ground by the back fence in their backyard. Anderson was near Roksa; Reyes then saw Anderson run to the fence, climb over the fence, and run away. At this time, Reyes also saw the shadow of a person behind the tarp-covered fence. Roksa had been shot several times and killed by a gunshot wound to the neck. An autopsy demonstrated that the lethal shot entered below Roksa's left ear and traveled downward, severing his carotid artery. Police

[2] Lucas also claimed in his opening brief that the jury was improperly instructed as to enhancement allegations. In his reply brief, Lucas states that he withdraws this claim. Therefore, we do not address the issue.

found a broken hammer near Roksa's garage and evidence that a padlock on the garage door had been "dinged" or scraped. There was marijuana in the garage and a tequila bottle near Roksa's body. Police also found evidence that bullets were shot through the fence that separated Roksa's property from an alleyway. The gun that fired the shots that killed Roksa was found in Anderson's backyard.

The Anderson jury was then excluded from the courtroom while evidence was introduced in the presence of the Lucas jury. Sergeant Steven Filson of the San Bernardino County Police Department testified as to statements Lucas made to him during an interview the day after the shooting. According to Sergeant Filson, Lucas stated that he, Anderson, and a third person, Michael Anderson (Michael),[3] went to Roksa's residence to steal marijuana. They attempted to force entry into Roksa's garage by breaking off a padlock with a hammer. When Roksa's dogs started barking, Roksa appeared. Lucas jumped onto a fence and pointed a gun at Roksa. Roksa swung a pipe at Lucas, who responded by shooting Roksa once. Lucas then jumped off the fence and continued firing more rounds at Roksa through the fence.

The Lucas jury was then excluded from the courtroom while Sergeant Filson testified before Anderson's jury. Through Sergeant Filson, the prosecution introduced

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[3] We use Michael Anderson's first name to distinguish him from defendant Anderson. There is no familial relationship between Charles Anderson and Michael Anderson.

audiotape recordings of police interviews with Anderson and Michael. During these interviews, Anderson and Michael described how they went with Lucas to Roksa's property to "jack him . . . for his weed." Lucas tried unsuccessfully to break the lock on Roksa's garage with a hammer. Michael then went to his house, a short distance away, to get a screwdriver to help break into the garage. Meanwhile, Roksa appeared and he and Anderson began to talk about drinking tequila together and buying marijuana. At some point, Roksa asked to "see the money." Lucas then stepped up on a fence or gate and pointed a gun at Roksa. Roksa swung a pole or pipe at Lucas. Lucas then shot Roksa, jumped down off the gate, and shot him six or seven more times through the fence.

The prosecution announced its "intention, subject to the introduction of exhibits, to rest." Counsel and the court then addressed and resolved issues concerning the admissibility of the prosecution's exhibits. Counsel for Anderson then told the court: "[A]ssuming that I rest my case in just a moment, it is my contention that evidence at that point is closed as to my client." On that basis, he requested that Anderson's "jury be excused for any defense evidence that is presented by [Lucas's counsel]." The prosecution opposed the request and the court, after hearing argument on the issue, denied Anderson's request. Anderson then rested without putting on any evidence.

Lucas's counsel called Michael as a witness. Michael, who was then serving his prison sentence for manslaughter in connection with the killing of Roksa, testified that Lucas was not at Roksa's residence the morning of the murder. Rather, only Michael and

Anderson went to Roksa's to buy marijuana. After arriving at Roksa's, Michael decided to break into the garage to steal the marijuana. For this purpose, he went to his house to get a screwdriver. On the way back from his house, he heard gunshots and saw Anderson kneeling by Roksa's gate.

Michael was cross-examined by Anderson's counsel. Anderson elicited from Michael that he is Lucas's friend and that they are affiliated with the Colton Crips. Michael also admitted that he told Sergeant Filson that Lucas had jumped over the fence and shot Roksa. During the prosecutor's cross-examination, Michael admitted telling the detective that he, Anderson, and Lucas went to Roksa's "to jack him for his dope," and to rob him. He further admitted telling the detective that Lucas "was standing up on the gate" and "shot him, just shot him five shots and took off." He did not recall ever seeing Anderson with a gun. In its rebuttal case, the prosecution introduced the testimony of Detective David Dillon. Detective Dillon testified that Michael told him shortly before the trial that he was going to testify "to help his home boy out" and that he did not want a "snitch jacket" in prison.

ANALYSIS

A. *Griffin Error*

The prosecution's evidence against Lucas included his statements to Sergeant Filson. Sergeant Filson did not audiotape or videotape his interview with Lucas; the statements were introduced into evidence through Sergeant Filson's testimony. On cross-

examination by Lucas's counsel, Sergeant Filson stated that he had recorded his interviews with Anderson and Michael on audiotape.

In his closing argument, Lucas's counsel suggested that Sergeant Filson's testimony as to Lucas's statements was not trustworthy because Sergeant Filson did not record his interview with Lucas. He directed the jurors' attention to the court's giving of CALJIC No. 2.70. This instruction included the admonition that "[e]vidence of an oral confession or an oral admission of a defendant not made in court should be viewed with caution." In the context of discussing this instruction, counsel stated that "[t]here's no dispute" as to what Anderson and Michael had said "because there's evidence. . . . It was recorded. It was preserved." By contrast, counsel pointed out, Sergeant Filson did not record Lucas's statements when it was "even more important and critical at that stage to have evidence that is [ir]refutable. He [Sergeant Filson] and only he had the opportunity to do that, and he did not do that."

In its rebuttal argument, the prosecution stated: "Now, the big issue, according to defense counsel, is that there was no tape recording of the defendant's statement. And he wants you to believe, therefore, that either that statement never happened, that the officer in some way is lying, fabricating, putting everything to -- that really this whole case that we have is a subterfuge. A fraud. [¶] I submit to you that that is not really the case. [¶] The instruction that he read to you [CALJIC No.] 2.70, regarding the confession and admission says, in the last paragraph: [¶] Evidence of an oral confession or an oral

admission of the defendant not made in court—not made in court—should be viewed with caution. [¶] Why is that? [¶] Well, we had Mr. [Michael] Anderson up here, for instance, on the stand, going over his statement. We were able to cross-examine him. We were able to say, 'What did you say here? What did you say here? Why did you say this[?]' [T]hose kind of things[.] [¶] It's hard to take a statement, and we can take, perhaps, the defendant's statement that he made to [Sergeant] Filson, and you have that statement given to you by [Sergeant] Filson. *It is hard for us and you, as jurors, to ask the person who made that statement, 'Why did you say that?' 'Cause that's not available to us.* The officer gives you the statements, and you have to look at it. [¶] So you have to be careful in looking at that, and any other statements made outside of court, but you look at it reasonably, you look at it in light of all of the jury instructions, you look at it in light of the [*sic*] all of the evidence, and then you decide for yourself whether it makes sense in light of all of the evidence." (Italics added.)

Lucas contends that the prosecutor's comments -- in particular, those we have italicized -- violated his Fifth Amendment right against self-incrimination under *Griffin.* "*Griffin* holds that the privilege against self-incrimination of the Fifth Amendment prohibits any comment by the prosecution on a defendant's failure to testify at trial that invites or allows the jury to infer guilt therefrom. [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481, 514.)

Lucas did not object to the prosecutor's comments, request that an admonishment be given, or move for mistrial. He does not contend that the statements were such that an objection would have been futile or that any prejudice was otherwise incurable by an admonition. He has therefore forfeited this claim on appeal. (See *People v. Hughes* (2002) 27 Cal.4th 287, 372; *People v. Carrera* (1989) 49 Cal.3d 291, 320.)

Even if the claim was not forfeited and the prosecutor's comments were contrary to *Griffin*, any error here would not compel reversal. *Griffin* error does not require reversal if it was harmless beyond a reasonable doubt. (*People v. Hardy* (1992) 2 Cal.4th 86, 154.) An error is harmless under that standard where the error was "'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Flood* (1998) 18 Cal.4th 470, 494.) "This determination 'must be based on our own reading of the record and on what seems to us to have been the probable impact of the . . . [errors] on the minds of an average jury.' [Citation.]" (*People v. Vargas* (1973) 9 Cal.3d 470, 478.)

The California Supreme Court has repeatedly stated that "'indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error. [Citations.]' [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340, quoting *People v. Hovey* (1988) 44 Cal.3d 543, 572.) Here, the prosecutor's comments were made in the context of explaining the need to view out-of-court confessions with caution under CALJIC No.

2.70. They were made in response to Lucas's counsel's reliance on that instruction to create doubt as to the accuracy of Sergeant Filson's testimony. The comments occur once and appear from the record as relatively unimportant in relation to everything else the jury considered. To the extent the prosecutor's statements could be interpreted as a reference to the fact that Lucas did not testify, the reference was indirect, brief, and mild.

In addition to the benign nature of the prosecutor's comments, the evidence clearly demonstrated that Lucas was involved in the charged crimes. The Lucas jury heard (through Sergeant Filson's testimony) the admission by Lucas that he had tried to break Roksa's garage padlock with a hammer and shot Roksa a number of times. This testimony was corroborated by the physical evidence of the lethal bullet's trajectory, the markings on the padlock, the broken hammer found at the scene of the crime, and Michael's pretrial statements. Thus, in light of the benign nature of the prosecutor's comments and the evidence against Lucas, even if the comment violated his rights under *Griffin*, the error was harmless beyond a reasonable doubt.[4]

Lucas relies primarily upon *People v. Guzman* (2000) 80 Cal.App.4th 1282. In *Guzman*, the defendant, Guzman, and William Hall were involved in an altercation

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[4] In his reply brief, Lucas contends that his trial counsel's failure to object to the prosecutor's comments constitutes ineffective assistance of counsel in violation of the Sixth Amendment. This claim requires Lucas to affirmatively prove prejudice resulting from the failure to object. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) Because we conclude that any *Griffin* error was harmless beyond a reasonable doubt, Lucas has, a fortiori, failed to prove prejudice from the failure to object.

following an automobile collision between them. Guzman was arrested and charged with hit and run driving and assault with a deadly weapon. Hall testified at trial for the prosecution; Guzman did not testify. After Guzman's counsel attacked Hall's credibility, the prosecutor tried to support the witness's credibility by emphasizing that, while the defendant tried to flee the crime scene, Hall "came 'to court and testifie[d] two times, [made] himself available, [came] in, put[] himself under oath, testifie[d] two times." (*Id*. at p. 1286.) The prosecutor mentioned Hall's willingness to testify during his rebuttal argument four times and used a demonstrative chart contrasting Hall's conduct, who came "to court to testify two times," with the defendant's conduct. (*Ibid*.) In finding that the comments violated *Griffin* and were prejudicial, the Court of Appeal explained: "This is not a case where a single isolated comment may have indirectly touched on the defendant's failure to testify. This is a case where the prosecutor repeatedly and flagrantly denigrated Guzman's constitutional right to remain silent. . . . [¶] [I]n terms of frequency, intensity and purpose, the prosecutor's comments were anything but benign." (*Guzman, supra,* at p. 1290.) In contrast to the prosecutor's repeated comments in *Guzman*, the prosecutor's comments here were isolated and without the frequency, intensity, or improper purpose apparent in *Guzman*.

B. *Failure to Give Accomplice Instruction to Anderson Jury*

"If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining 'accomplice.' (E.g., CALJIC No[s]. 3.10, 3.14,

3.15, 3.17.) It also must instruct that an accomplice's incriminating testimony must be viewed with caution (e.g., CALJIC No. 3.18) and must be corroborated (e.g., CALJIC No[s]. 3.11, 3.12, 3.13). If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury (e.g., CALJIC No. 3.16); otherwise, it must instruct the jury to determine whether the witness is an accomplice (e.g., CALJIC No. 3.19)." (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

Anderson contends that the court erred in failing to sua sponte instruct the jury as to accomplice principles regarding the testimony of Michael. Without conceding that Michael was an accomplice as a matter of law, the People do concede that his "testimony inferentially made him an accomplice to appellate Anderson." As such, the issue of whether Michael was an accomplice was, at a minimum, a question that should have been put to the jury. (See *People v. Zapien* (1993) 4 Cal.4th 929, 982.) The People contend, however, that any instructional error was harmless. We agree.

"A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 370, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 834.)

Here, there was sufficient evidence of corroboration. In his audiotaped statements played before his jury, Anderson described how he, Lucas, and Michael went to Roksa's to "jack [Roksa] for his dope." Lucas and Michael had told him that Lucas had the gun with him that was used to kill Roksa and later found in Anderson's yard. Lucas, Anderson stated, tried to break the padlock on Roksa's garage with a hammer. When Roksa appeared, Anderson talked with Roksa while Michael went to get a screwdriver to continue the burglary effort. According to Anderson, when Roksa announced that he wanted to see money, Lucas shot him. Anderson then jumped over the gate and fled. Paul Reyes testified that after hearing what sounded like a staple gun, he saw Anderson standing close to Roksa's body and then fleeing over the fence. Such statements are ample evidence of Anderson's involvement in the crime and more than sufficient to corroborate Michael's testimony.

Anderson also contends that the failure to instruct as to accomplice principles violated his constitutional right to due process. As we recently stated, "the corroboration requirement itself is a matter of state law, not due process. [Citations.] A fortiori, when there is sufficient corroboration, the failure to give accomplice instructions does not violate due process. [Citations.]" (*People v. Felton, supra,* 122 Cal.App.4th at pp. 273-274.)

C. *Denial of Motion to Exclude Anderson Jury During Presentation of Lucas Defense*

Anderson contends that the trial court erred in denying his request to exclude his jury from hearing evidence presented in Lucas's defense case. Anderson asserts that Lucas's defense was "antagonistic" and "blame-shifting," and that Michael's testimony was "devastating" to him. By allowing his jury to hear such evidence, he argues, he has been deprived of a fair trial. We disagree.

The use of multiple juries in a joint trial, as in this case, has arisen from the confluence of two rules. The first is the rule favoring joint trials. Under section 1098, criminal defendants charged jointly with a crime must be tried jointly unless the court orders separate trials.[5] (§ 1098; *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) This statute expresses a "general preference for joint trial of jointly charged defendants." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1049; accord *People v. Singh* (1995) 37 Cal.App.4th 1343, 1374.) Under this rule, joint trials are "the rule and separate trials the exception." (*People v. Massie* (1967) 66 Cal.2d 899, 923.) The second rule is derived from the holdings in *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*). Under *Aranda* and *Bruton,* the extrajudicial statements of a nontestifying codefendant implicating the other defendant generally are

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[5] Lucas and Anderson were initially charged in separate informations. The People subsequently filed a motion to consolidate the two cases, which the court granted. Neither defendant moved to sever the case and neither contends that the trial court erred in granting the People's motion to consolidate.

inadmissible against the other defendant in a joint trial because that defendant is deprived of the right to confront the nontestifying declarant. (*Bruton, supra,* at pp. 126, 137; *Aranda, supra,* at pp. 529-531.)

In *People v. Harris* (1989) 47 Cal.3d 1047, our state Supreme Court "held that the problem addressed in *Bruton* and *Aranda* may be solved by the use of separate juries for codefendants, with each jury to be excused at appropriate times to avoid exposure to inadmissible evidence." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1207-1208 (*Jackson*).) The dual jury "procedure facilitates the Legislature's statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287 (*Cummings*).) When separate juries are employed, "each jury [may] be excused . . . to avoid exposure to inadmissible evidence." (*Jackson, supra,* at p. 1208.) The use of dual juries is not a basis for reversal on appeal in the absence of either "identifiable prejudice resulting from the manner in which it is implemented" (*Harris, supra,* at p. 1075) or "gross unfairness" that deprives the defendant of a fair trial or due process (*Cummings, supra,* at p. 1287).

Significantly, Anderson does not contend that Michael's testimony was inadmissible under any rule of evidence. Nor does he argue that allowing his jury to hear

Michael's testimony violated his rights under *Aranda* or *Bruton*.[6] Instead, he argues that if he had "been separately tried, the jury would never have heard any of the devastating [Michael]-related testimony, for [Michael] was not called as a witness by the prosecution, only by the co-defendant." Initially, we note that Anderson's argument is based upon conjecture. Although the prosecutor did not call Michael to testify in its case-in-chief in the joint trial, he might have done so in a separate trial of Anderson. In the joint trial, the prosecutor might have anticipated that Lucas would call Michael and, for tactical or strategic reasons, elected to cross-examine Michael at that time rather than call him during the People's case-in-chief. If the two defendants had separate trials, however, the prosecutor could have called Michael to testify against Anderson. Just as "'speculative allegations as to possible prejudice do not meet the burden of showing an abuse of discretion in denying a motion for severance[,]' [citations]" (*United States v. Porter* (1st Cir. 1985) 764 F.2d 1, 13) they do not establish the "identifiable prejudice resulting from the manner in which it is implemented" required for reversal (*People v. Harris, supra,* 47 Cal.3d at p. 1075).

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[6] Indeed, his jury was excluded from the courtroom when Lucas's extrajudicial statements were presented by Sergeant Filson to the Lucas jury. Anderson's claim on appeal concerns the testimony of Michael. Michael, however, did not testify as to any statement made by Lucas incriminating Anderson or otherwise. Moreover, to the extent Michael's testimony inculpated Anderson, Anderson's attorney had the opportunity to, and did, cross-examine Michael. (See *Nelson v. O'Neil* (1971) 402 U.S. 622, 627; *People v. Wardlow* (1981) 118 Cal.App.3d 375, 387.)

Moreover, the fact that the prosecution and Anderson had rested did not render Michael's testimony "inadmissible evidence" against him. (*Jackson, supra,* 13 Cal.4th at p. 1208.) Anderson points out that if both he and the prosecutor had rested in a case in which he was tried alone, the case would have been closed to evidence at that point and Michael's testimony would not have been considered by the jury. (See §§ 1093 & 1094.) While true, Anderson was not tried alone and had no right to a separate trial. (See *People v. Baa* (1944) 24 Cal.2d 374, 377; *People v. Wallace* (1970) 13 Cal.App.3d 608, 616.) The issue is thus not whether Michael's testimony would have been precluded in a separate trial under the rules governing the order of proof if neither side called Michael as part of their case-in-chief, but whether the evidence was inadmissible against him in his joint trial with Lucas. We find no basis in the record for concluding that Michael's testimony was inadmissible against him here. Indeed, while Anderson asserted below that his jury should be excused because, he argued, the case was closed to evidence as to him, he did not object to Michael's testimony below on evidentiary grounds and does not assert any such ground on appeal.

The fact that separate juries were employed does not alter the analysis or compel a different result. Separate juries were used because of the anticipated introduction of the codefendants' statements, each implicating the other, which could not be introduced in the presence of the jury for the nondeclarant codefendant. This procedure, employed to avoid *Aranda-Bruton* error, does not render evidence inadmissible against one defendant

that would be admissible against both codefendants at a joint trial. The use of dual juries was implemented to shield Anderson from the unfairness and prejudice that might have resulted from the introduction of Lucas's statements; Anderson cannot use the procedure as a sword to exclude evidence admissible against him.

Even if a jury at a separate trial would not have heard Michael's "devastating" testimony, "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." (*Zafiro v. United States* (1993) 506 U.S. 534, 540.) In *Jackson, supra,* 13 Cal.4th 1164, one defendant in a two-defendant dual jury case claimed that he was prejudiced when cross-examination by his codefendant's counsel elicited "testimony detrimental to defendant." (*Id*. at p. 1208.) In rejecting the claim, the *Jackson* court noted that the defendant failed to identify any evidence brought out on cross-examination "that would have been inadmissible at a separate trial. The mere fact that a damaging cross-examination that the prosecution could have undertaken was performed instead by codefendant's counsel did not compromise any of defendant's constitutional or statutory rights." (*Ibid*.; see also *Cummings, supra,* 4 Cal.4th at p. 1286, fn. 25.) The same rationale applies here. The fact that any damaging testimony from Michael was elicited during Lucas's defense case, rather than during the prosecution's case-in-chief, did not compromise any of defendant's constitutional or statutory rights.

Nor does Anderson's claim that Lucas's defense was "antagonistic" toward him and "blame-shifting" require the exclusion of his jury. "That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials [citations], let alone establish abuse of discretion in impaneling separate juries." (*Cummings, supra,* 4 Cal.4th at p. 1287; accord *Zafiro v. United States, supra,* 506 U.S. at pp. 538-539.) *Cummings* involved two defendants tried jointly for murder before separate juries. The defendants claimed that their defenses were antagonistic because they disputed the identity of the killer. (*Cummings, supra,* at p. 1287.) Even so, our state Supreme Court held that no prejudice occurred. The court explained: "That each was involved in the incident was undisputed . . . and the prosecution had offered evidence sufficient to support verdicts convicting both defendants. As the People observe, this was not a case in which only one defendant could be guilty. The prosecution did not charge both and leave it to the defendants to convince the jury that the other was that person. Here the prosecution theory was that both defendants participated in, and were guilty of, the murder. Most of the additional evidence each defendant offered to support his attempt to shift blame to the other would have been admissible had the prosecution sought to offer it. In these circumstances there was no abuse of discretion in denying complete severance and no prejudice as a result of joint trial on the murder charge before separate juries." (*Id*. at pp. 1287-1288.) Just as in *Cummings*, the prosecution theory was that both defendants participated in the murder;

and, like the additional evidence introduced by the defendants in that case, Michael's testimony "would have been admissible had the prosecution sought to offer it."

We conclude that Anderson has failed to show either prejudice from the manner in which the dual jury procedure was used in this case or gross unfairness that deprived him of a fair trial or due process.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.